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No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DONALD F. GOLDBERG,

Petitioner,

v.

UNITED STATES DEPARTMENT OF STATE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Should the 1974 Congressional Amendments to Exemption 1 of the Freedom of Information Act, 5 U.S.C. § 552(b)(1), which were enacted by Congress pursuant to this Court's invitation in EPA v. Mink, 410 U.S. 73, 81, 83 (1973) for the specific purpose of overruling that decision, be construed as ineffective and meaningless?

2. What standards and criteria should lower courts follow in deciding summary judgment motions and the merits in Exemption 1 cases?

PARTIES TO THE PROCEEDINGS

The only parties to these proceedings are identified in the caption.

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UNITED STATES DEPARTMENT OF STATE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Donald F. Goldberg petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. 1a-17a) is reported at ____ U.S. App. D.C. ____, 818 F.2d 71 (1987). The opinion of the United States District Court for the District of Columbia (App. 21a-53a) is unreported.

JURISDICTION

The judgment of the Court of Appeals (App. 18a-19a), was entered on May 8, 1987. A timely petition for rehearing was denied by order entered on July 24, 1987 (App. 20a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

5 U.S.C § 552(b)(1) provides:

> "(b) This section does not apply to matters that are --
>
> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order . . . ."

STATEMENT OF THE CASE

Some 138 Ambassadors at diplomatic posts around the world sent cable questionnaire responses on the subject of diplomatic practices and reciprocity to the State Department in Washington, D.C. (App. 3a). Ninety-six or more of the responses were specifically marked "unclassified", 7 were classified "confidential", and the remaining 35

contained a designation inapplicable to classified documents (App. 5a n. 4 and 15a n. 10). After the questionnaire responses were requested under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), by petitioner, the State Department classified portions of all of them (App. 5a n. 4).

When suit was instituted in the District Court, the government submitted the declaration of Mr. John E. Eaves, a State Department employee, who explained why, in declarant's view, each document properly was classified. Petitioner opposed the government's motion for summary judgment on two levels.

First and foremost, petitioner relied on the fact the some 96 different Ambassadors around the world had marked the cable responses "unclassified."

There is a significant difference between a document which contains no classification markings and one marked "unclassified." When a document contains this term of art, it means that the Ambassador has reviewed the document to determine whether it should be classified, and decided that it does not require classification (App. 6a, 14a-15a). Second, petitioner relied on other materials of record which, in his view, created disputed factual issues. For example, some of the withheld documents were specifically marked "declassified." This permitted the inference that, after the document was initially classified, a higher authority reversed that ruling and determined that it should be released. As another example, Eaves asserted that some of the

withheld documents contained "foreign government information," which is by definition information furnished by a foreign government in confidence (App. 16a n. 11). Petitioner argued that Ambassadors situated in a foreign country are in a better position to determine whether the information they received from a foreign government was provided in confidence than was Mr. Eaves, who is located in Washington, D.C., and has no known contact with those foreign governments. Petitioner also pointed to public reports which raised questions whether some of the withheld materials may have been published.

While the Eaves declaration describes why Eaves believes each document was properly classified, it

does not address the contrary evidence relied upon by petitioner (App. 11a n. 7, 16a). Thus the Eaves declaration does not address the considered decisions by some 96 Ambassadors that the questionnaire responses should not be classified, or explain why his judgment should be preferred to 96 contrary ones. The Eaves declaration also does not address or confront the other facts of record upon which petitioner relied to oppose summary judgment.

The District Court did not grant petitioner's request to submit a few limited interrogatories to respondent, and entered summary judgment for the government.

The Court of Appeals affirmed the District Court's grant of summary judgment to the party bearing the burden of proof in a de novo proceeding. The Court of Appeals did not dispute that petitioner's evidence was about as strong as a FOIA plaintiff in an Exemption 1 case could realistically hope to obtain (App. 6a, 15a-17a). However, it concluded that that evidence was insufficient to create a disputed factual issue or justify the denial of summary judgment to respondent.

In particular, the Court of Appeals ultimately accepted the inference that the "unclassified" label reflected conscious decisions in accordance with applicable regulations by some 96 Ambassadors that the cable responses should not be classified (App. 15a-16a).

It nevertheless held that even this inference was not enough to defeat the government's summary judgment motion. According to the Court of Appeals (App. 16a), petitioner had to produce more "direct or extrinsic" evidence of why 96 considered judgments should be allowed to dispute a single contrary one. But the Court of Appeals did not explain how petitioner could obtain such evidence from either the 96 Ambassadors or Eaves without discovery, and affirmed the District Court's decision which failed to grant petitioner leave to submit even a few limited interrogatories to respondent. Petitioner's suggestion for rehearing in banc was denied without dissent.

The result of the decision below is to make it practically impossible for a FOIA requester in an Exemption 1 case to defeat summary judgment whenever the government produces an affidavit by an employee which asserts the withheld documents are classified properly.

REASONS FOR GRANTING THE WRIT

This case raises important questions about the scope and administration of Exemption 1. The effect of the judgment below is that the courts should abandon any meaningful role in Exemption 1 cases, despite a clear and unequivocal directive by Congress to the contrary. The reasoning of the Court of Appeals leads to the extreme conclusion that, even if executive officials of the highest rank review a document and reach the

considered conclusion it should not be classified, summary judgment will be entered against a journalist seeking the document if the agency produces a "detailed" affidavit by a lower ranking employee who sets out a contrary conclusion. The Court of Appeals also has reached the conclusion -- in contrast with other decisions from the same Circuit -- that in Exemption 1 cases the government is entitled to summary judgment even when critical facts are in dispute. This Court has not revisited Exemption 1 in the 14 years since EPA v. Mink, 410 U.S. 73 (1973). This case represents an appropriate vehicle for review because the legal issues are outlined in bold relief.

I. WHETHER THE 1974 CONGRESSIONAL AMENDMENTS TO EXEMPTION 1 SHOULD BE CONSTRUED AS MEANINGLESS AND INEFFECTIVE IS AN IMPORTANT QUESTION WARRANTING REVIEW.

A. In EPA v. Mink, 410 U.S. 73, 81-84 (1973), the Court held that Exemption 1 as originally enacted did not authorize the judiciary to review the substantive propriety of classification decisions or go behind an agency affidavit stating the documents were properly classified pursuant to an Executive Order. But the Court went out of its way to make clear that Congress was free to change that result if wished to do so.[1/] Id. at 81, 83, and 94-95.

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1 "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures -- subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering. But Exemption 1 does neither." Id. at 83 (citation omitted).

In 1974 Congress accepted the Court's invitation and amended Exemption 1 in two important respects. First, Exemption 1 was narrowed to cover only documents which "are in fact properly classified"; 5 U.S.C. § 552 (b)(1)(B) (emphasis supplied). Second, in Exemption 1 cases (like other FOIA cases) the judiciary was directed to conduct a searching de novo review, with the burden on the government to sustain the propriety of its classification decision.2/

Contrary to the plain Congressional intention, the Court below in effect interpreted "properly" not to signify

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2 The legislative history of the 1974 amendments is explained in considerable detail in Ray v. Turner, 587 F.2d 1187, 1190-1195, 1206-1214 (D.C. Cir. 1978).

substantive validity, but only that a properly authorized individual had made the decision.

The position of the Executive Branch in 1974 was that classification decisions should be entitled to a presumption of correctness, and should be overridden only if lacking a reasonable basis. Congress rejected that position both during its consideration of the 1974 amendments prior to final passage, and subsequently in overriding a Presidential veto.[3] Since they were passed by a vote of over two thirds of each House of Congress, the 1974 amendments have even more majoritarian legitimacy than most statutes. The decision below makes those amendments a nullity, and provides

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[3] See Ray v. Turner, supra n.2, 587 F.2d at 1193-1194, 1206-1209.

classification decisions with an even greater degree of insularity from judicial review than the Executive Branch was willing to accept in 1974.

B. Exemption 1 implicates two vital interests. The first is the nation's interest in insuring that properly classified national security information is kept secret. The second is the nation's interest in insuring that information which is not properly classified -- and especially information which is wrongly classified in order to conceal wrongdoing or embarrassment -- becomes public. The first of these interests is fully protected by Exemption 1, and will remain so if the mandate of Congress is followed. But the Court of Appeals' decision

undermines the public's interest in ensuring that improperly classified information is disclosed.

The Executive Branch classifies from twenty to one hundred million new documents each year. Dunn, Judging Secrets, 31 Vill. L. Rev. 471, 473 (1986). Hundreds of millions, and perhaps billions, of documents classified in earlier years remain classified. The estimates as to what percentage of these documents are improperly classified vary. Responsible people like former Senator Howard Baker and former Justice Arthur Goldberg have estimated that between seventy-five percent and ninety-five percent of all classified documents never should have been classified in the first place. Id. at 474. An administration official

testifying before Congress in 1982 estimated that approximately five percent of executive branch documents are overclassified. Id. at 474-475. Whatever the correct figure, it is beyond dispute that a large number of documents which should be made public have been classified improperly. The decision below ensures that, despite the clear intent of Congress to the contrary, those documents will remain classified until the Executive Branch chooses to release them.

C. Under the Court of Appeal's reasoning (App. 15a-16a), if the President, the Director of Central Intelligence, and the Secretaries of Defense and State all had reviewed a document, determined that it should not be classified, and specifically marked

it "unclassified," that would not be sufficient to make the document available to the public under FOIA. Indeed, if a journalist was denied access to the document, and a lower level government employee produced a "detailed" affidavit explaining why he or she believed the document subsequently was classified properly, summary judgment would be entered for the government.

This decision is therefore likely to have significant implications for the future. In many future cases when an agency wishes to withhold a document from the public, and the withholding cannot be justified by invoking any other FOIA exemption, the urge to reach for the "Exemption 1" stamp will be strong. If the desire to withhold the

document stems from the fact that its disclosure would embarrass the agency or reveal its wrongdoing, the temptation to reach for the "Exemption 1" stamp often will prove irresistible. Under the decision below, once that stamp is placed upon a document by an agency employee willing to sign an affidavit claiming the document is classified properly, the agency will be entitled to summary judgment.

D. This case does not involve questions about the scope of Executive privilege. The government has made no claim of Executive privilege in this case, which involves relatively mundane State Department documents which some 96 Ambassadors have determined should not be classified. EPA v. Mink, 410 U.S. 73, 83 (1973); see Nixon v.

Administrator of General Services, 433 U.S. 425, 445 (1977); see also New York Times Co. v. United States, 403 U.S. 713, 718-719 (1971).

II. THE STANDARDS AND CRITERIA WHICH LOWER COURTS SHOULD FOLLOW IN DECIDING EXEMPTION 1 CASES ARE IMPORTANT MATTERS DESERVING REVIEW.

A. In King v. United States Department of Justice, ____F.2d ____, ____, No. 84-5098, slip op. at 14 and n. 61 (D.C. Cir. Sept. 25, 1987), the Court of Appeals, citing six of its earlier decisions, stated that an agency is entitled to summary judgment in an Exemption 1 case "only if" its detailed affidavits are not "controverted by contrary record evidence . . . ." See Abbotts v. Nuclear Regulatory Commission, 766 F.2d 604, 606 (D.C. Cir. 1985); and Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir.

1981). In this case, by contrast, the Court of Appeals had held that the agency is entitled to summary judgment even though the conclusions in the sole declaration upon which it relies are directly contradicted by 96 different ones. Review is warranted to resolve this intra-Circuit disharmony.

B. FOIA litigation is unusual because it involves a claim to documents which a plaintiff cannot see. On the one hand, the government must defend itself without disclosing the contents of documents it believes are exempt from disclosure. On the other, a FOIA plaintiff must attempt to oppose governmental summary judgment motions without any knowledge, personal or otherwise, of the information withheld, and with little or no access to admissible

evidence which will controvert the government's motion. These difficulties are compounded by the fact that, when a FOIA plaintiff seeks any discovery, the government invariably opposes the request, as it did successfully here.

The Eaves declaration is significant because, while it states declarant's reasons for concluding each document is properly classified, it nowhere confronts the contrary evidence of record upon which petitioner relied. Eaves does not attempt to show, for example, why subsequent events justify the present classification of information which properly was unclassified at an earlier time. Rather, the Eaves declaration asserts conclusions which directly and frontally contradict those of the Ambassadors.

Under summary judgment principles applicable in the routine case, the moving party has the burden of showing the lack of a factual dispute, and summary judgment is inappropriate when the evidence is in direct conflict on a critical issue. This case raises issues important to the administration of Exemption 1 cases in the lower courts, including the standards that govern the disposition of summary judgment motions, whether and in what circumstances a plaintiff may be entitled to discovery, and the criteria by which the ultimate question whether or not a document is properly classified should be made.

* * * * *

In cases like Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 557 (1978),

the Court of Appeals failed to follow the legislature's mandate that judicial review be narrowly circumscribed, and engaged in excessive judicial intervention. This case raises the question whether the Court of Appeals has failed to follow the mandate of Congress by going to the opposite extreme. In this case, Congress has directed de novo review and the Court of Appeals has virtually abandoned any judicial function.

It is not an overstatement to say that, when it come to Exemption 1 cases, under the decision below Article I powers are inoperative, Article III powers are ineffective, and Article II powers are paramount. Indeed, under the decision below the dispositive Article II powers are exercised not by

Ambassadors or executive officials of high rank, but rather by a lower employee who adopts a contrary view in a post hoc declaration.

CONCLUSION

It is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5397

DONALD F. GOLDBERG, APPELLANT

v.

U.S. DEPARTMENT OF STATE

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 85-1497)

Argued April 6, 1987

Decided May 8, 1987

Raymond D. Battocchi, for appellant. *Walter H. Fleischer* also entered an appearance for appellant.

Michael L. Martinez, Assistant United States Attorney, with whom *Joseph E. diGenova*, United States Attorney, *Royce C. Lamberth* and *R. Craig Lawrence*, Assistant United States Attorneys were on the brief for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: WALD, *Chief Judge*, MIKVA and BORK, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* WALD.

WALD, *Chief Judge*: Appellant Donald F. Goldberg, a journalist on the staff of Jack Anderson, seeks release of information contained in the responses of United States ambassadors around the world to a Department of State questionnaire on foreign government practices with respect to our missions abroad. The government withheld parts of those responses from him, asserting that some of the information contained therein was properly classified as "confidential" and thus exempt from the disclosure requirements of the Freedom of Information Act (FOIA).[1] The District Court agreed and granted summary judgment for the government, giving little credit to appellant's efforts to create a material, trialworthy dispute out of the fact that the majority of the ambassadors responding to the State Department's unclassified questionnaire marked their response cables unclassified as well. Appellant contends that this fact, alone, unrefuted and unexplained by the government, is sufficient to raise a material issue of fact to defeat summary judgment.

Mindful of the judiciary's responsibility under FOIA to review de novo challenged classification decisions, and of the acknowledged difficulties petitioners face in overcoming a government classification decision without having access themselves to the documents in question, we nonetheless do not find in the facts of this case reason to proceed to trial. We conclude that petitioner's evidence as to the ambassadors' unclassified responses is in-

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[1] 5 U.S.C. § 552. FOIA Exemption 1 makes the statute's disclosure requirements inapplicable to certain matters required to be kept secret "in the interest of national defense or foreign policy." 5 U.S.C. § 552(b)(1). The information was classified pursuant to Executive Order 12356, 47 Fed. Reg. 14874 (1982).

adequate to controvert the detailed and particularized affidavit submitted by the State Department on the reasons for classifying the withheld responses. Accordingly, we affirm the District Court's grant of summary judgment.

I. BACKGROUND

On October 13, 1982, the United States Department of State sent out by cable an unclassified questionnaire to all United States embassies and diplomatic posts around the world, requesting information concerning host government diplomatic practices and reciprocity. Joint Appendix (J.A.) 107-10. The questionnaire covered a broad range of issues, from the availability of medical facilities, to embassy security, to the accessibility of host country officials. The purpose of the questionnaire was to establish a data base on reciprocity issues and to help the State Department prioritize matters of concern for discussion and negotiation.

Appellant Goldberg filed a FOIA request with the State Department on June 5, 1984 seeking copies of the ambassadors' responses to the 1982 questionnaire. He requested the information as a journalist acting in the public interest. J.A. 102. After certain administrative delays, on March 26, 1985 the State Department informed Goldberg that it had located 161 documents in response to his FOIA request, but that only four could be fully released. Of the remaining 157 documents, nine were not to be released at all, and 148 were to be released with certain portions omitted. The State Department asserted that FOIA Exemption 1 applied to all of the withheld information.[2]

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[2] The State Department also claimed that FOIA Exemption 2 applied to two document portions, and that FOIA Exemption 5 applied to three withheld excerpts. Exemption 2 frees "matters related solely to the internal personnel rules and practices of the agency," from the scope of FOIA's disclosure requirements. 5 U.S.C. § 552(b)(2). Exemption 5 per-

Goldberg brought an action in the District Court seeking disclosure of the excised document portions. The State Department filed an extensive affidavit, J.A. 217-346, indexing and describing the withheld information and asserting that the excerpts were properly classified pursuant to Executive Order 12356,[3] and simultaneously

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tains to inter- or intra-agency communications "which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The District Court granted summary judgment *sua sponte* for Goldberg on the Exemption 2 information and the State Department has complied with the disclosure order. J.A. 212-16. The District Court also granted summary judgment for the government with respect to the Exemption 5 documents; Goldberg has not appealed that aspect of the trial court's decision.

[3] The affidavit, presented in the form required by Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), was prepared by John Eaves, Director of the Office of Mandatory Review in the Classification and Declassification Center of the State Department. Eaves is authorized to classify Top Secret material and to downgrade and declassify national security information pursuant to Executive Order 12356, 47 Fed. Reg. 14874 (1982), and Department of State regulations, 22 C.F.R. § 9.14.

The Eaves affidavit explains classification decisions based on sections 1.3(a)(2), (a)(3), and (a)(5) of Executive Order 12356. *See infra* Part II.A. It divides the questionnaire responses into six groups based on the kind of information withheld. Group I, involving twenty-three documents, includes excerpts dealing with security measures adopted to protect official personnel and premises of United States missions abroad. The excerpted materials consist of the answers to questions 4.G and 4.H of the questionnaire (use of two-way radios), question 7 (protection of individuals), and question 8 (protection of premises). J.A. 235-36.

Group II consists of excerpts taken from thirty-five documents. In addition to including answers to questions 4.G-H, 7 and 8, these excerpts contain "candid comments" regarding relations with host governments, and comparisons of the

moved for summary judgment. In opposition, Goldberg attempted to create a triable issue out of the initial decisions of most of the ambassadors (or their delegates) not to classify their questionnaire responses.[4] He as-

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treatment received by the United States with that afforded to the missions of third countries. J.A. 244-46.

Group III's excerpts from twenty-six documents once again deal with matters of personnel and mission security. The excerpts from Group III documents also include statements or lists indicating the relative priority that, in each ambassador's view, various reciprocity issues should be given in United States-host country relations. J.A. 257-58.

The excerpts from the forty-six documents in Group IV contain the kinds of information covered by Groups II and III. These excerpts, in addition to addressing security measures, deal with host country relations and contain lists of priorities regarding unsettled differences between the United States mission and the host country. J.A. 267-69.

Group V consists of only nine documents either fully or substantially withheld. These documents are separate follow-up cables dealing solely with the issue of the United States mission's priorities in its dealings with the host government on a host of matters. J.A. 282-83.

The final group of withheld excerpts is really not a group at all, but a collection of eighteen individually described documents that did not fit any of the other five groups. The affidavit briefly describes why each of these excerpts was withheld. J.A. 288-333.

[4] Seven responses were originally marked "confidential," *see* J.A. 252 (Yemen Arab Republic), 255 (Nigeria), 277 (India), 298 (Bulgaria), 301 (German Democratic Republic), 312 (Yugoslavia), and 332 (Zambia). Thirty-five were marked "limited official use," *see, e.g.*, J.A. 248 (Paraguay, Uruguay, Hungary), 270 (Indonesia, Laos, Malaysia), 285 (Pakistan, Cameroon, Guinea, Ivory Coast). The remainder were marked "unclassified."

In response to Goldberg's FOIA request, the State Department reviewed all the relevant materials. As a result, portions of most documents were classified. Documents previously labelled "confidential" or "limited use only" in their entirety were released in substantial part.

serted that unlike the more common situation where unmarked materials are later classified and withheld, in this case the ambassadors explicitly marked their responses "unclassified." The Foreign Affairs Manual specifically instructs State Department officials to treat such a marking as a term of art:

> *Wholly Unclassified Material*
>
> Normally, unclassified material shall not be marked or stamped "Unclassified" unless it is essential to convey to a recipient of such material that it has been examined with a view to imposing a security classification and that it has been determined that it does not require classification.

5 United States Department of State, Foreign Affairs Manual § 933.3 (FAM), J.A. 143. Goldberg also argued that the documents marked "limited official use" should be treated as unclassified, because the Foreign Affairs manual proscribes the use of that phrase to identify national security information. 5 FAM § 912(a)(3), J.A. 133. The District Court rejected Goldberg's argument that a trial is required to determine the validity of the reclassification, where information is initially designated "unclassified" and later classified. Memorandum Opinion (Mem. Op.) at 10, J.A. 203. On appeal Goldberg asserts in essence that he has come as close to producing the "smoking gun" as a FOIA petitioner faced with an Exemption 1 claim can ever realistically hope to, and that he was entitled to a trial, including limited discovery, examination of Eaves and *in camera* inspection of a representative sample of documents.

II. Withholding Information Under a Disclosure Statute

The Freedom of Information Act requires agencies to comply with "any request for records," 5 U.S.C. § 552(a)(3), unless one of nine specific exemptions apply, 5 U.S.C. § 552(b). It is clear from the language of

the statute, and the congressional persistence in amending statutory language to overturn overly restrictive judicial interpretations,[5] that FOIA compels disclosure in every case where the government does not carry its burden of convincing the court that one of the statutory exemptions apply. Exemption 1—the "national security exemption"—is relevant to this appeal.

A. *Exemption 1*

Recognizing that the disclosure of some information could be contrary to important national security interests, Congress provided for an exemption from FOIA requirements for matters "specifically required by Executive order to be kept secret in the interest of foreign policy." 5 U.S.C. § 552(b)(1) (1970). Notwithstanding a de novo judicial review provision elsewhere in FOIA, *see* 5 U.S.C. § 552(a)(4)(B), the Supreme Court interpreted Exemption 1 to require courts routinely to defer to government affidavits stating that documents had been properly classified, without engaging in any direct substantive review of the withheld information. *EPA v. Mink*, 410 U.S. 73 (1973). Congress promptly responded by amending FOIA and clarifying its intent that courts act as an independent check on challenged classification decisions. Exemption 1 now applies only to matters that are

> (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy *and (B) are in fact properly classified* pursuant to such Executive order.

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[5] The legislative history of FOIA Exemption 1, and of the 1974 amendments enacted in response to the Supreme Court's restrictive interpretation in EPA v. Mink, 410 U.S. 73 (1973), are carefully reviewed and analyzed by this court in both the per curiam and concurring opinions in Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978) (per curiam); *Id.*, 587 F.2d at 1199 (Wright, J. concurring).

Pub. L. 93-502, § 2(a) (emphasis added), *amending* 5 U.S.C. § 552(b)(1). As the statute and legislative history and numerous decisions of this court make clear, the district court is now required to conduct a de novo review of the classification decision, with the burden on the agency claiming the exemption. 5 U.S.C. § 552 (a)(4)(B); *Salisbury v. United States*, 690 F.2d 966 (D.C. 1982); *Ray v. Turner*, 587 F.2d 1187 (D.C. Cir. 1978). In carrying out this de novo review, courts should "accord *substantial weight* to an agency's affidavit concerning the details of the classified status of the disputed record," [6] albeit without relinquishing their independent responsibility: "While *in camera* examinations need not be automatic, in many situations it will plainly be necessary and appropriate." S. Rep. No. 1200, 93d Cong., 2d Sess. 9 (1974).

Exemption 1 does not itself provide the applicable substantive standard for withholding information, but rather references standards defined by Executive Order. In this case, we turn to Exective Order 12356, 47 Fed. Reg. 14874 (1982), for national security classification standards:

> 1.3 *Classification Standards*
> (a) Information shall be considered for classification if it concerns:
> . . .
> (2) the vulnerabilities or capabilities of systems, installations, projects, or plans relating to national security;
> (3) foreign government information;
> . . . [or]
> (5) foreign relations or foreign activities of the United States.

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[6] Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981) (quoting S. Rep. No. 1200, 93d Cong., 2d Sess. 12 (1974)) (emphasis added by court).

47 Fed. Reg. at 14876. We must measure the State Department's affidavit explaining its classification of the withheld information, against these standards. Moreover, we must ensure that information *not*

> be classified in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interest of national security.

Executive Order 12356, § 1.6(a).

While Executive Order 12356 forbids classifying documents to cover up information that is embarrassing, but not threatening to national security, it explicitly allows agencies to make classification and reclassification decisions in light of, and at the time of, FOIA requests.

> (c) The President or an agency head or official designated . . . may reclassify information previously declassified and disclosed if it is determined in writing that (1) the information requires protection in the interest of national security; and (2) the information may reasonably be recovered. These reclassification actions shall be reported promptly to the Director of the Information Security Oversight Office.
>
> (d) Information may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act, . . . if such classification meets the requirements of this Order and is accomplished personally and on a document-by-document basis by the [designated agency person].

47 Fed. Reg. 14877-78. So long as the new classification is appropriate under the standards of § 1.3, reclassification is permitted.

B. *Summary Judgment Standards*

The exercise of independent, responsible, de novo review of classification decisions under Exemption 1 does

not necessarily require a full trial. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure is still available to either party. Indeed, this court has already set out the particular standard district courts should apply to motions for summary judgment in Exemption 1 cases:

> [A]n agency is entitled to summary judgment if its affidavits describe the withheld information and the justification for withholding with reasonable specificity, demonstrating a logical connection between the information and the claimed exemption, . . . and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.

Abbotts v. Nuclear Regulatory Commission, 766 F.2d 604, 606 (D.C. Cir. 1985) (internal quotations omitted).

In deciding whether to grant summary judgment, district courts should give the agency the opportunity to present detailed affidavits, and accord those affidavits "substantial weight," considering the agency's "unique insights into what adverse [e]ffects might occur as a result of public disclosure." S. Rep. No. 1200, *supra*, at 12. The district court must insist, however, that such affidavits afford a "relatively detailed analysis [of the material witheld] in manageable segments." "[C]onclusory and generalized allegations of exemptions" are not acceptable. *Ray v. Turner*, 587 F.2d at 1191 (D.C. Cir. 1978) (quoting *Vaughn v. Rosen*, 484 F.2d at 826 (D.C. Cir. 1973)); *see also* S. Rep. No. 854, 93d Cong., 2d Sess. 15 (1974) (explicitly supporting *Vaughn* approach). The affidavits must furthermore demonstrate "a logical connection between the information and the claimed exemption." *Salisbury v. United States*, 690 F.2d at 970.

The District Court applied the appropriate summary judgment standard here and concluded that the Eaves affidavit complied with the requirements set out in *Ab-*

botts v. NRC. The affidavit "describes both the material withheld and justifications underlying those withholdings with particularity, and it amply demonstrates the connection between the information withheld and the exemption claimed in a non-conclusory fashion." Mem. Op. at 8, J.A. 201. We find little to dispute on that score;[7] indeed, it is to the second part of the *Abbotts* test that Goldberg's arguments are directed.

In order to obtain summary judgment under the decisions of this court, the agency's affidavit must not be "controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit*

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[7] Although the Eaves affidavit might have been more complete had it recognized and dealt with the ambassadors' different views on the proper classification of the questionnaire responses, it certainly does an adequate job of justifying the current classification of the document excerpts. The affidavit demonstrates a careful, document-by-document and answer-by-answer review. Documents that had originally been classified "confidential" in their entirety have been partially released. Documents marked "limited official use" have been brought into conformity with recognized national security classifications, by releasing some of the information contained in them as unclassified, and withholding other excerpts as "confidential." *See supra* note 4.

The Eaves affidavit identifies particular answers to questions, describes in some detail the kind of information that ambassadors provided in response, and links that information to the national security and foreign relations interests listed in Executive Order 12356. For example, information about the use of two-way radios in embassy vehicles and about the kind of security forces permitted at United States missions directly concerns "the vulnerabilities or capabilities of systems, installations," Executive Order 12356, § 1.3(a)(2). Information concerning the relationship between the United States mission and the host country, and the mission's priorities for dealing with difficulties they may be having, or with unsettled differences concerning diplomatic reciprocity matters, addresses "foreign relations or foreign activities of the United States," Executive Order 12356, § 1.3(a)(5). *See supra* note 3.

Project v. Casey, 656 F.2d at 738. Goldberg opposed the government's motion for summary judgment by alleging not that the State Department has proceeded in bad faith, but that the undisputed fact that the majority of the ambassadors responding to the questionnaire marked their answers "unclassified" constitutes "contrary evidence in the record" controverting the State Department's assertion that the withheld information was properly classified. The District Court found, however, that the explicit authority to reclassify documents at the time of a FOIA request, *see* Executive Order 12356, § 1.6, directly contradicted Goldberg's proposition.

> [P]laintiff would have this Court rule that where information originally designated "unclassified" is later classified, the original classification status of the information casts such doubt on the propriety of the later classification that a trial is necessary to determine the validity of that reclassification. Such a rule would necessarily result in what plaintiff protests: a vast over-classification of innocuous information by forcing agencies to classify information initially at the highest level possible, or face trial if that information is later deemed sensitive and is sought in a FOIA action. In addition, such a rule penalizes agencies for exercising their legitimate authority under the Executive Order.

Mem. Op. at 10, J.A. 203. The District Court then granted summary judgment for the State Department on all Exemption 1 claims.

III. In Search of Grounds for Trial

The only question for this court is whether the information withheld under Exemption 1 has been properly classified. Whether it was once unclassified is immaterial under FOIA. Executive Order 12356, § 1.6(d) authorizes agencies to reclassify documents even while there is a FOIA request pending for that very information.

Goldberg's best argument, which the District Court rejected, was that the fact that some one hundred ambassadors acting independently explicitly marked the cables "unclassified," at least raises an issue of fact as to whether portions of those cables are now improperly classified "confidential."[8] Goldberg asks the court to

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[8] Goldberg has also offered a series of other reasons why summary judgment on the classification question should not have been granted: he has argued that the fact that some of the documents were at some point marked "*de*classified," *see, e.g.*, J.A. 89-94 (Tunisia), compels the inference that someone with declassification authority decided that the documents could now be released to the public, regardless of how they were previously designated, *see* 5 FAM § 921, J.A. 136. This argument does not significantly differ from Goldberg's main challenge and neither does the response: the Eaves affidavit explains why the document is properly classified now, pursuant to the reclassification authority of Executive Order 12356, § 1.6. The mere fact that a document has been recently reclassified, without more, does not controvert a detailed explanation why the document is properly classified today.

Goldberg has argued that because the Eaves affidavit claimed Exemption 2 with respect to two document excerpts, but the District Court concluded that the exemption for "internal personnel rules and practices," 5 U.S.C. § 552(b)(2), did not apply, "there is reason to believe that [Eaves'] position on Exemption 1 may be equally incorrect." Appellant's Brief at 20. The fact that the court disagreed with Eaves with respect to the Exemption 2 excerpts only demonstrates that the court properly exercised its de novo review responsibility. The same court reviewed Eaves' Exemption 1 claims and upheld them. Nothing can be inferred with respect to whether documents were properly classified, from the resolution of the dispute on the Exemption 2 claims.

Goldberg has also tried to introduce evidence into the record that diplomatic posts have a tendency to overclassify cables whenever in doubt. *See* Declaration of Donald F. Goldberg, J.A. 118-21. If indeed ambassadors generally overclassify documents, Goldberg argued, then the fact that many of them designated their questionnaire responses "unclassified" is especially significant. Goldberg's evidence, however, consists

draw an inference from the "unclassified" marking on the majority of the cabled responses, that, as the Foreign Affairs Manual prescribes, each of those ambassadors thought it "essential to convey" that the information in the cable had been "examined with a view to imposing a security classification and that it ha[d] been determined" not to require classification.[9] 5 FAM § 933.3, J.A. 143. Even accepting, as the District Court appeared to, that each ambassador had this provision of the Foreign Affairs Manual in mind when he or she marked the cable "unclassified," the court found good reason to

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of his own statement relating the contents of a conversation he had with Mr. Steven Garfinkel, Director, Information Security Office, General Services Administration, and of an experience Goldberg had "some time ago," when a State Department employee showed him a cable marked "confidential" which contained information that "seemed identical" to information already published in a State Department human rights report. J.A. 120. The District Court, although clearly troubled by the form of Goldberg's submission—a declaration based not on personal knowledge, but on the opinions of another—accepted the declaration for purposes of ruling on the summary judgment motion, but did not find it persuasive. Mem. Op. at 4 n.1, J.A. 197. We are similarly unmoved. Mr. Garfinkel's opinion, as related by Goldberg, is only that: the opinion of an official in another agency, about the degree of care exercised by diplomatic officials, generally. It does not in any way controvert the explanations provided in the Eaves affidavit with regard to why certain portions of these particular documents were properly classified. Moreover, the fact that the State Department decided that it was appropriate to release some previously classified information regarding human rights violations, does not suggest that it must now release the information at issue here.

[9] The district court found it unnecessary to determine whether a United States ambassador stationed abroad, or Mr. Eaves in his Washington, D.C. office, is best qualified to determine whether the ambassador's questionnaire responses should be classified. The issue for the court is not who had the ultimate authority to reclassify, but whether the present classification is a correct one.

reject Goldberg's argument for releasing the information, finding it to be in direct conflict with the reclassification provisions of Executive Order 12356.

Goldberg does not argue that the earlier (non) classification decision in any way precludes or interferes with the right of the State Department to *reclassify* the ininformation later, but merely that it precludes *summary judgment* as to whether the latter classification was proper. Neither does he deny that had the responses been unmarked, the Eaves affidavit would have been sufficient to support summary judgment for the agency. *See* Appellant's Brief at 21-22. Essentially, Goldberg contends that this case should be treated as if the hundred or so ambassadors had each stated that the information the State Department was now trying to withhold under Exemption 1 did not, in his or her view, qualify for classification under the standards of Executive Order 12356 because it was clearly publicly available or did not otherwise require protection in the interest of national security.

That, however, is not the case before us. We have only an "unclassified" label attached to the documents by the ambassadors without a hint as to their rationales for arriving at such a classification. It may be, as the Eaves affidavit notes, that most ambassadors sent their responses back unclassified because that was the label on the questionnaire itself. J.A. 221. But even assuming that we must credit those classifications as the product of the kind of conscious decisionmaking the Foreign Affairs Manual contemplates,[10] without more these earlier

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[10] *See* 5 FAM § 933.3, J.A. 143. The Foreign Affairs Manual also says that the label "limited official use" should not be used to identify classified materials, yet thirty-five ambassadors used that term, rather than leaving their cables unmarked or labeling them either "unclassified" or "confidential"—the approved terms of art. *See supra* note 4. It is unclear what inference, if any, we should draw from those markings.

decisions cannot raise a material issue of fact about the validity of the later decision in view of the explicit authority for such reclassifications. To defeat summary judgment here, Goldberg needed more direct or extrinsic evidence from the ambassadors or others, that the later classification was in error.

Without denying that the Eaves affidavit would have been more helpful if it had directly addressed the fact that the majority of the cables were initially labelled "unclassified," [11] we nonetheless conclude that the State Department's burden in this case did not extend to explaining why its reclassification decision departed from the prior, *unexp'ained* decisions of its ambassadors. Neither FOIA nor Executive Order 12356 impose any additional requirements on agencies when they reclassify documents than when they initially classify them pursuant to a FOIA request. In order to controvert a reclassification decision, a FOIA petitioner must do more

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[11] For example, in this case, the Eaves affidavit claimed that certain "foreign government information" had been withheld pursuant to § 1.3(c) of Executive Order 12356, *see, e.g.*, J.A. at 288-90 (Australia), because "[d]isclosure of information given in confidence by one government would lessen our prospects of receiving further information and cooperation not only from that government but from others as well, since a breach of confidence of this nature would not go unnoticed in diplomatic circles," J.A. 227. It certainly would have been helpful to the court in deciding whether summary judgment was appropriate, if the Eaves affidavit had provided some explanation of why Eaves knew but the ambassador did not or did not consider relevant, that the information had been provided in confidence. *See* J.A. 288 (Australia questionnaire response originally marked "unclassified"). Although the omission is essentially harmless in this case, because we agree that information concerning a "possible new agreement with the Government of Australia," J.A. 289, was properly withheld, agency affidavits should generally provide reasoned explanations for discrepancies of this sort.

than point to evidence that the information sought was at some previous time classified differently. His contrary evidence must somehow undermine or call into question the correctness of the classification status of the withheld information, or the agency's explanation for the classification. The Eaves affidavit carefully explained why certain portions of the documents were properly classified and Goldberg's evidence simply does not controvert those explanations.

IV. Conclusion

Goldberg has presented a novel and interesting challenge to the District Court's decision upholding summary judgment for the government, by asserting that a demonstrable conflict within an agency as to the proper classification status of a withheld document raises a genuine issue as to a material fact and warrants to a trial. On the facts of this case, however, Goldberg cannot prevail. We do not accept his argument that the affixing of conclusory "unclassified" labels on responses to an unclassified questionnaire *by itself* controverts a detailed review and explanation that some parts of those documents are properly classified.

Because we find that there is insufficient evidence in the record to controvert the agency's affidavit, we affirm the District Court's decision granting summary judgment.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5397 September Term, 1986
Civil Action No. 85-1497

Donald F. Goldberg,
Appellant

v.

U.S. Department of State

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: WALD, Chief Judge, MIKVA and Bork, Circuit Judges

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

/s/
George A. Fisher
Clerk

Date: May 8, 1987
Opinion for the Court filed
by Chief Judge Wald.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5397 September Term, 1986
CA No. 85-01497

Donald F. Goldberg

v.

U.S. Department of State

BEFORE: **WALD**, Chief Judge; **MIKVA** and **BORK**, Circuit Judges

[Filed July 24, 1987]

O R D E R

Upon consideration of appellant's petition for rehearing, it is **ORDERED**, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER,
CLERK

BY: /s/
Robert A. Bonner
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DONALD F. GOLDBERG,	)	
	)	
Plaintiff,	)	
	)	
	)	Civil Action
	)	No. 85-1497
	)	
UNITED STATES DEPARTMENT OF STATE,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

On October 13, 1982, defendant United States Department of State sent a questionnaire to all United States diplomatic posts requesting information about security and other problems in various countries. Plaintiff Donald F. Goldberg filed a request with defendant under the Freedom of Information Act, 5 U.S.C. § 522 (FOIA), seeking the responses submitted by the U.S. embassies and foreign missions. He now

brings this suit challenging defendant's decision to withhold 157 responsive documents in whole or in part. Defendant has moved for summary judgment. For the reasons set forth below, that motion will be granted with respect to all withholdings except two statements, which will be released to plaintiff.

I.

The 1982 questionnaire at issue was sent to all diplomatic posts in an effort to establish a data base on reciprocity issues between the United States and each foreign country, and to establish priority issues of concern for the Department of State. It requested information on a host of issues ranging from the acquisition of real property to the availability of medical facilities.

Responses to these questions were provided to plaintiff. The questionnaire also sought information concerning the level of security at each embassy or diplomatic mission, and other aspects of the host government's relations with U.S. diplomatic posts. It is this information that defendant has withheld and that plaintiff seeks here.

Defendant identified 161 documents responsive to plaintiff's request. Of these, four were released in their entirety and nine were withheld in full. The remaining 148 were released with various excisions. In justifying the selected withholdings, defendant relied primarily on FOIA Exemption 1, which exempts from disclosure information concerning national security. In addition, two documents were withheld in

part under Exemption 2, which allows an agency to withhold information pertaining to the internal rules and practices of the agency, and Exemption 5, which excuses from disclosure inter- and intra-agency memoranda that would not be available to a party by law in civil litigation. In moving form summary judgment, defendant has submitted the affidavit of John Eaves, Director of the Office of Mandatory Review in the Classification and Declassification Center of the Department of State. The Eaves affidavit divides the material withheld into five categories, identifies the documents or redactions included in each category and describes the information withheld under each, and explains the basis for withholding such information under the

FOIA exemption cited. In opposition to defendant's motion, plaintiff makes essentially three arguments: first, that there are material questions of fact concerning the classification status of the embassy responses; that the initial classification status of these responses demonstrates the invalidity of defendant's invocation of Exemption 1; and that there are material questions of fact concerning whether defendant is required by law to disclose the information at issue and whether defendant may have in fact made much of this information public already.

II.

At the outset, plaintiff challenges defendant's assertion, made as part of its statement of material facts not in dispute, that "[m]any of the documents

withheld were originally not classified upon their receipt by the State Department because the outgoing questionnaire was not classified." Defendant's Statement of Material Facts Not in Dispute, ¶ 12. Plaintiff points out that the Eaves affidavit itself indicates that most of the responses were in fact marked "unclassified," and that a smaller number were marked "limited official use," a designation indicating that the material is not classified. Under the classification guidelines set out in the Department of State's Foreign Affairs Manual ("FAM"), a designation of "unclassified" is made only where "it is essential to convey to a recipient of such material that it has been examined with a view to imposing a security classification and it has been

determined that it does not require classification." 5 FAM 933.3. Plaintiff asserts that each ambassador has a duty to determine whether information forwarded in a reply cable should be classified before it is sent to the State Department, and that U.S. embassies typically over classify information out of an abundance of caution.[1] The fact that the responses

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[1] In making these assertions, plaintiff relies on information obtained from Steven Garfinkel, Director, Information Security Office, General Services Administration. Defendant objects to plaintiff's attempt to raise questions of material fact by submitting an affidavit that is not based on personal knowledge, but on the opinions of another, and that is replete with hearsay. The Court is similarly troubled by the inadequacies of plaintiff's affidavit and does not wish to condone such submissions. Nonetheless, the Court is willing to accept the averments in plaintiff's affidavit for present purposes as they do not alter the Court's conclusion that defendant is entitled to summary judgment.

at issue here were originally marked "unclassified" means that the U.S. ambassadors determined that the information in those responses did not require classification. Thus, plaintiff believes, the classification status of the responses is a material fact very much in dispute.

The Court does not agree. To begin with, there is no real dispute over the status of the responses received by the State Department. As a matter of grammar, defendant' statement that "[m]any of the documents withheld were originally not classified upon their receipt by the State Department" is not inconsistent with plaintiff's contention that the responses were originally marked "unclassified" by the ambassadors who sent them. The Court reads

defendant's statement simply to mean that defendant did not, upon receipt of the documents, change their status from "unclassified" to "confidential." The Court, therefore, accepts as true the statements in the Eaves affidavit indicating that most of the responses were originally marked "unclassified".

A. Exemption 1

It is clear that under governing Executive Order 12,356, document can be classified at the time a FOIA request seeking that document is made, or even after part of the document is publicly released. Exec. Order No. 12,356 § 16(c) and (d). The question to be decided here is whether defendant's decision to classify information marked "unclassified" was proper.

Exemption 1 permits agencies to withhold information "specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy and [that is] in fact properly classified pursuant to such Executive Order." 5 U.S.C. § 522(b)(1). Executive Order 12,356 provides for the classification of information the release of which "reasonably could be expected to cause damage to the national security." Exec. Order No. 12,356 § 1.3(b). Specifically it states that information should be considered for classification if it concerns "the vulnerabilities or capabilities of systems, installations, projects or plans relating to the national security . . . foreign government infor-

mation . . . [or] foreign relations or foreign activities of the United States." Id. § 1.3(a). The State Department has the burden, of course, of demonstrating that the documents in question were properly classified. Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984); Lesar v. United States Dep't of Justice, 636 F.2d 472 (D.C. Cir. 1980). Courts, however, are to accord "substantial weight" to an agency's classification decision and supporting affidavit when reviewing the agency's invocation of Exemption 1. Ashar v. Dep't of State, 702 F.2d 1125, 1131 (D.C. Cir. 1983); Hayden v. National Security Agency, 608 F.2d 1381, 1387 (D.C. Cir. 1979), cert. denied, 446 U.S. 37 (1980); Gold v. Central Intelligence Agency, 607 F.2d 339, 352 (D.C. Cir.

1979), cert. denied, 445 U.S. 927 (1980). This Circuit has made clear that:

> an agency is entitled to summary judgment if its affidavits "describe the withheld information and the justification for withholding with reasonable specificity, demonstrating a logical connection between the information and the claimed exemption" . . . and "are not controverted by either contrary evidence in the record nor by evidence of agency bad faith."

Abbotts v. Nuclear Regulatory Commission, 766 F.2d 604, 606 (D.D.C. Cir. 1985) (quoting Military Audit Project v. Case), 656 F.2d 724, 738 (D.C. Cir. 1981)).

The Eaves affidavit divides the documents withheld under Exemption 1 into five groups based on the information they contain. The first group, consisting of 23 documents,

concerns security measures undertaken at each embassy or mission. As the affidavit explains, the other four groups also include information about security measure, but in each additional information is also withheld. Thus, in the second group, which consists of 35 documents, defendant has in addition to security information, withheld statements regarding relations between our government and the host government, Eaves Affidavit 26-28; in the third group of 26 documents, defendant has withheld statements assessing diplomatic priorities by the United States on the issue of diplomatic reciprocity, id. 38-40; in the fourth group, which includes 46 documents, defendant has excised comments or relations with the host government as well as statement

concerning diplomatic reciprocity, id. at 47-49; and in the fifth group of nine documents, defendant has withheld the separate responses submitted by some U.S. posts on the issue of diplomatic reciprocity. Id. at 62-63. For each group, the affidavit explains the reasons behind the withholdings and the anticipated harms that would result from disclosure. Information concerning security measures at embassies and other posts clearly concerns the vulnerabilities of U.S. installations and is of an obviously sensitive nature. Responses pertaining to relations between the U.S. Government and host governments fall squarely within the language of Executive Order 12,356; these responses were withheld out of concern that disclosure might create

tension in foreign relations and would be viewed as a breach of international diplomatic norms. Similarly, information regarding issues of reciprocity implicate U.S. foreign relations and the foreign activities of this country. Defendant states that disclosure of this information, even to friendly governments, could undermine ongoing negotiations by revealing United States priorities and concerns. The same reasons are offered in support of the withholdings made in the fourth and fifth groups, which also concern issues of reciprocity and relations with host governments.

The Eaves affidavit easily satisfies the requirements set out in Abbotts v. Nuclear Regulatory Commission and earlier cases. It describes both the

material withheld and the justifications underlying those withholdings with particularity, and it amply demonstrates the connection between the information withheld and the exemption claimed in a non-conclusionary fashion. Plaintiff does not challenge the adequacy of the affidavit itself, however, but rather contends that it is controverted by contrary evidence in the record. The evidence plaintiff cites is the original classification status of the documents. Given the highly protective standards set out in the FAM governing the classification of embassy telegrams, and the tendency of diplomatic personnel to overclassify material, the fact that 138[2/] ambassadors forwarded the

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2 Because some diplomatic posts submitted both an initial cable response and a follow-up cable response, the total number of responses received

responses in question under the designation "unclassified" raises a material question of fact, plaintiff contends, as to the propriety of the subsequent decision to classify this information. Indeed, plaintiff argues that diplomatic personnel are in a far better position to assess what information will be of use to terrorists or will create tension with host nations than a person such as Mr. Eaves, who works in a Washington, D.C. office.

These arguments are misplaced. First, this Court is not prepared to say which officials in the State Department are in the best position to assess the relative importance of information to U.S. national security interests. While plaintiff portrays Mr. Eaves as a

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(footnote continued)
exceeds the number of diplomatic posts.

faceless Washington bureaucrat, he is the director of the State Department's Classification and Declassification Center, and it is not at all apparent that his assessments of the information withheld are to be accorded less deference than those of the ambassadors who forwarded the responses. Given Eaves' responsibilities, and the fact that it is the State Department which directs the activities of U.S. diplomatic posts, and not vice versa, the Court sees no reason to assume that Eaves' decision to classify the responses at issue here is improper simply because it is different from the initial determinations of the ambassadors.

Second, and more importantly, plaintiff's argument seriously denigrates the authority given to persons such as Eaves under Executive Order 12,356, which allows for the reclassification of information to higher level of confidentiality. Plaintiff argues that the "recent wave of espionage cases filed in various courts around the country shows that the government spends too much time attempting to classify innocuous information, and too little time protecting the truly important national security information which must be classified." Plaintiff's Opposition at 6. Yet plaintiff would have this Court rule that where information originally designated "unclassified" is later classified, the original

classification status of the information casts such doubt on the propriety of the later classification that a trial is necessary to determine the validity of that reclassification. Such a rule would necessarily result in what plaintiff protests: a vast over-classification of innocuous information by forcing agencies to classify information initially at the highest level possible, or face a trial if that information is later deemed sensitive and is sought in a FOIA action. In addition, such a rule penalizes agencies for exercising their legitimate authority under the executive order.

The Court is not insensitive to the plight of plaintiffs in FOIA actions seeking information withheld under Exemption 1: such plaintiffs must

challenge withholdings of material they have never seen and must therefore speculate as to the nature of the information withheld. In addition, they fight the strong presumption of validity that attaches to an agency's invocation of Exemption 1. Nevertheless, the Court finds that defendant has discharged its burden of demonstrating the propriety of the classification of information sought here, and has adequately justified its refusal to disclose that information. The mere fact that the information was at one time marked "unclassified," without more, is insufficient to preclude summary judgment for the government.

B. Exemption 5

Defendant also withheld three documents in part, and one document in its entirety, under Exemption 5, which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). It was intended to allow agencies to withhold internal documents that would be protected from discovery in litigation, Federal Open Market Committee v. Merrill, 443 U.S. 340 (1979), and its "ultimate purpose . . . is to prevent injury to the quality of agency decisions" by permitting frank and open discussion of legal and policy issues. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975). "Accor-

dingly, . . . courts have uniformly drawn a distinction between predecisional communications, which are privileged, . . . and communications made after the decision and designed to explain it, which are not." Id. at 151-52 (citations and footnotes omitted).

Here, defendants withheld specific recommendations by U.S. embassies in Australia, China, Bulgaria, and Poland to the State Department concerning various issues of importance. See Eaves Affidavit at 69, 72, 79, 86. One such issue, for example, was whether certain privileges should be withdrawn from Polish diplomats in the United States to assure fairer treatment for U.S. personnel in Poland. Id. at 86. Such withholdings fall squarely within the

rationale underlying Exemption 5, by protecting candid predecisional discussions of policy issues, and accordingly they must be upheld. Defendant has also withheld one document, number 29, in its entirety, claiming that the recommendations on policy formulation included in the document are inextricably tied to the factual descriptions of the problems discussed. It is true, as plaintiff notes, that Exemption 5 protects opinions and recommendations and not factual information in a document. Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 867 (D.C. Cir. 1980). The Court need not address defendant's claims of nonsegregability, however, as defendant also withheld the document in full under Exemption 1, and

the Court has already upheld the validity of defendant's invocation of that exemption.

C. Exemption 2

Finally, defendant redacted two statements from two documents on the grounds that they relate solely to the internal practices of the State Department, which, if revealed to the host or other foreign governments, would impede the effective operation of the agency. Eaves Affidavit at 78, 82. As such, defendant contends, they are shielded from disclosure under Exemption 2, which protects information "related solely to the internal personnel rules of an agency." 5 U.S.C. § 552(b)(2). This exemption "applies to 'routine matters' of 'merely internal significance' in which the public lacks

any substantial or legitimate interest." Lesar v. Dep't of Justice, 636 F.2d at 485. Defendant's invocation of this exemption, therefore, is inconsistent with its underlying rationale: by claiming that disclosure of the information will impede effective agency operations, defendant has demonstrated that the material is not of "merely internal significance," but rather of interest to persons outside the agency. Moreover, defendant has nowhere asserted, as it must, that the public has no legitimate interest in the information sought. Defendant, therefore has failed to carry its burden and justify its redactions of these two statements. While plaintiff has not, as yet, moved this court for summary judgment, the Court will grant such

judgment with respect to these two withholdings. The parties have agreed, and the Court has found, that there are no material facts in dispute. There is thus no reason to delay a grant of summary judgment on these two withholdings while the parties brief the issue, since defendant's opposition to the grant of such a motion can consist of nothing more than its proffered justification of the redactions, which this Court has already found to be without merit. Nor has defendant sought to protect the information on any other ground: despite its broad application of Exemption 1 to most of the information sought here, defendant has not suggested that disclosure of the material withheld under Exemption 2 would in any way damage the national

security interests of the United States. Rather, it has said only, in conclusory fashion, that disclosure "would impede the effective operation of this agency."3/ Summary judgment will therefore be entered in favor of plaintiff with respect to these two withholdings.

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3 While the State Department deals with matters pertaining to the national security in the area of foreign affairs, the Court is unwilling to equate impairment of agency operations with damage to the national security. Defendant invoked Exemption 1 to protect a wide range of information from disclosure where disclosure could damage foreign relations or other national security interests. That these two statements were not similarly protected under Exemption 1 leads this Court to the conclusion that the information is not sensitive or worthy of such protection.

D. Plaintiff's Supplemental Opposition

In a supplemental opposition, plaintiff raises several contentions that merit little discussion. He speculates that (1) defendant may have some statutory or other legal duty to disclose the information sought here; (2) that a June, 1985 report issued by the Secretary of State's Advisory Panel or Overseas Security discussing matters of embassy security may have revealed some of the information sought here; and (3) that defendant may have disclosed such information at congressional hearings concerning diplomatic reciprocity. Plaintiff offers no support whatever for his suggestion that defendant is under some legal obligation to disclose the information at issue. Defendant carried its burden of

justifying its withholdings under Exemptions 1 and 5; it does not have an additional burden of disproving plaintiff's speculation that some law other than FOIA may require disclosure of the material sought here. Plaintiff's further speculation that because Congress has looked into the question of diplomatic reciprocity, defendant may have disclosed material withheld here, is equally unfounded. The mere fact of congressional interest in this subject, standing alone, does not raise questions as to whether defendant disclosed any of the information in this case. Nor does the issuance of an advisory report on embassy security measures. Plaintiff seems to believe that the mere recitation of these two events is

sufficient to cast doubt on the validity of the Eaves affidavit and the agency's lengthy justifications of its withholdings. Unsubstantiated guesswork, however, is not a legitimate means of challenging an otherwise adequate affidavit justifying withholdings in a FOIA action.

For all the foregoing reasons, it is this 30th day of May, 1986

ORDERED that summary judgment be and it hereby is granted in favor of defendant United States Department of State and against plaintiff Donald F. Goldberg with respect to all redactions and withholdings made by defendant pursuant to Exemptions 1 and 5. With respect to the two statements withheld from documents 137 and 138 under authority of Exemption 2, summary

judgment be and it hereby is granted to plaintiff and against defendant, and defendant be and it hereby is directed to release these two statements.

SO ORDERED.

/s/
JOYCE HENS GREEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DONALD F. GOLDBERG,	)	
	)	
Plaintiff,	)	
	)	
	)	Civil Action
	)	No. 85-1497
	)	
UNITED STATES DEPARTMENT OF STATE,	)	
	)	
Defendant.	)	

JUDGMENT

In accordance with the Memorandum Opinion and Order issued this date, summary judgment be and it hereby is granted in favor of defendant United States Department of State and against plaintiff Donald F. Goldberg with respect to all redactions and withholdings made by defendant pursuant to Exemptions 1 and 5. With respect to the two statements withheld from documents 137 and 138 under authority of

Exemption 2, summary judgment be and it hereby is granted to plaintiff and against defendant, and defendant be and it hereby is directed to release these two statements within fifteen (15) days.

/s/
JOYCE HENS GREEN
United States District Judge

May 30th, 1986

(2)

FILED
FEB 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-655

In the Supreme Court of the United States

OCTOBER TERM, 1987

DONALD F. GOLDBERG, PETITIONER

v.

UNITED STATES DEPARTMENT OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly granted summary judgment in favor of the Department of State in this suit under the Freedom of Information Act seeking classified documents that were withheld under Exemption 1 of the Freedom of Information Act, 5 U.S.C. 552(b)(1).

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No. 87-655

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v.

UNITED STATES DEPARTMENT OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 818 F.2d 71. The opinion of the district court (Pet. App. 21a-52a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a-19a) was entered on May 8, 1987, and a petition for rehearing was denied on July 24, 1987 (Pet. App. 20a). The petition for a writ of certiorari was filed on October 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On October 13, 1982, the Department of State sent an unclassified questionnaire by cable to all United States foreign missions and embassies throughout the world,

seeking information concerning security and diplomatic practices encountered in foreign countries. The purposes of the questionnaire were to establish a data base regarding these practices, including the status of reciprocity between the United States and each foreign country, and to help establish which issues should be of priority concern to the Department of State. Pet. App. 3a, 22a-23a.

On June 5, 1984, petitioner, a staff writer for columnist Jack Anderson, filed a request under the Freedom of Information Act (FOIA) for, inter alia, the responses of United States foreign embassies and missions to the October 13, 1982, questionnaire. On March 26, 1985, the Department of State informed petitioner that it had located 161 documents responsive to his FOIA request. Four of those documents were released in full, nine were withheld in full, and the remaining 148 were released with portions withheld. As relevant here, the Department of State based the withholdings on Exemption 1 of the FOIA, which applies to matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "are in fact properly classified pursuant to such Executive order" (5 U.S.C. 552(b)(1)). The information at issue in this case was classified pursuant to Section 1.3(a) of Executive Order No. 12,356, 3 C.F.R. 166 (1983), which provides for the classification of information that concerns "the vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security; * * * foreign government information; * * * [and] foreign relations or foreign activities of the United States." See Pet. App. 2a, 3a, 23a.[1]

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[1] The Department of State also withheld five documents under FOIA Exemptions 2 and 3, 5 U.S.C. 552(b)(2) and (3), but those withholdings are not at issue here. Pet. App. 3a-4a n.2.

2. a. After the Department of State partially denied petitioner's FOIA request, petitioner filed this suit in the United States District Court for the District of Columbia seeking release of the documents and excerpts withheld. The Department of State filed a motion for summary judgment, which was supported by a *Vaughn* index[2] in the form of a 112-page declaration of John Eaves, the Director of the Office of Mandatory Review in the Classification and Declassification Center of the Department of State (C.A. App. 217-333). As the court of appeals stated (Pet. App. 4a n.3), under governing State Department regulations, Eaves was specifically authorized to classify and declassify national security information. The Eaves declaration divided the material into six groups according to subject matter, such as security measures at each embassy or mission, relations between our government and the host government, assessments of the United States' diplomatic priorities with the host government, and issues of diplomatic reciprocity. The declaration identified the documents or redactions in each category, described the information withheld, and set forth the basis for the classification under Executive Order No. 12,356. See Pet. App. 4a-5a & n.3, 24a-25a, 33a-35a.

Mr. Eaves stated in the declaration that many of the responses were originally designated as unclassified when they were received by the Department of State, reflecting the fact that the questionnaire itself was not classified (C.A. App. 221). However, Mr. Eaves explained that "[b]ecause of the likelihood that disclosure of some of the contents would cause damage to the national security," he reviewed each document that was covered by petitioner's FOIA request and classified those portions that warranted

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[2] See *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

classification (*ibid.*). Section 1.6(d) of Executive Order No. 12,356 specifically provides that "[i]nformation may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act * * * if such classification meets the requirements of [the] Order and is accomplished personally and on a document-by-document basis by [the designated agency official]." Pet. App. 5a n.4, 12a, 15a, 26a. Petitioner argued, however, that because many of the questionnaire responses were returned to the Department of State marked "unclassified," there was a genuine issue of material fact as to whether the material withheld was properly classified by Eaves (*id.* at 36a-37a).

b. The District Court granted summary judgment in favor of the Department of State (Pet. App. 21a-52a). Quoting the test established by District of Columbia Circuit precedent, the court stated that

> an agency is entitled to summary judgment if its affidavits "describe the withheld information and the justification for withholding with reasonable specificity, demonstrating a logical connection between the information and the claimed exemption" . . . and "are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.

Pet. App. 32a (quoting *Abbotts* v. *NRC*, 766 F.2d 604, 606 (D.C. Cir. 1985), and *Military Audit Project* v. *Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). Here, the court found that the Eaves declaration "easily" satisfied the *Abbotts* test, because it "describes both the material withheld and the justifications underlying those withholdings with particularity, and it amply demonstrates the connection between the information withheld and the exemption claimed

in a non-conclusionary fashion" (Pet. App. 35a-36a). Thus, the court agreed with the Department of State that information regarding security measures at foreign embassies and other posts "clearly concerns the vulnerabilities of U.S. installations and is of an obviously sensitive nature"; that "[r]esponses pertaining to relations between the U.S. Government and host governments fall squarely within the language of Executive Order 12,356" because "disclosure might create tension in foreign relations and would be viewed as a breach of international diplomatic norms"; and that "information regarding issues of reciprocity implicate U.S. foreign relations and the foreign activities of this country" and, if disclosed, "could undermine ongoing negotiations by revealing United States priorities and concerns" (Pet. App. 34a-35a).

The district court noted, however, that petitioner did not actually challenge the adequacy of the Eaves declaration itself under *Abbotts*, but instead contended that the affidavit was "controverted by * * * contrary evidence in the record" within the meaning of the latter portion of the *Abbotts* formulation.[3] The contrary evidence upon which petitioner relied was the fact that many of the responses to the questionnaire had been designated as unclassified before they were received by the State Department from the various embassies and other posts. The district court found this argument "misplaced" for two reasons (Pet. App. 36a-41a).

First, the court was not prepared to say that the foreign post was in a better position than Mr. Eaves to assess the relative importance of the information to the national security interests of the United States. To the contrary,

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[3] As the court of appeals observed (Pet. App. 12a), petitioner did not contend that there was "evidence of agency bad faith" under the *Abbotts* formulation.

"[g]iven Eaves' responsibilities, and the fact that it is the State Department which directs the activities of U.S. diplomatic posts, and not vice versa, the [c]ourt [saw] no reason to assume that Eaves' decision to classify the responses at issue here [was] improper simply because it [was] different from the initial determinations of the ambassadors" (Pet. App. 38a). More fundamentally, however, the court concluded that petitioner's argument "seriously denigrates the authority given to persons such as Eaves under Executive Order 12,356, which allows for the reclassification of information to [a] higher level of confidentiality" (*id.* at 39a). In its view, if the courts adopted a rule under which the original classification status of the information casts sufficient doubt on the propriety of a later classification decision to require a trial on the validity of the latter, the result would be to "penalize[] agencies for exercising their legitimate authority under the executive order" and to create an incentive to overclassify information (*id.* at 40a). Accordingly, the court held that "[t]he mere fact that the information was at one time marked 'unclassified,' without more, is insufficient to preclude summary judgment for the government" (*id.* at 41a).[4]

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[4] In opposing the government's motion for summary judgment, petitioner also submitted an affidavit stating that he had been told by the General Services Administration's Information Security Office that " 'there is a tendency to overclassify' cable messages" and that foreign embassies often "err on the side of caution" in classifying information (C.A. App. 118-121). The Department objected to the affidavit on the ground that it was based on another person's opinion, not petitioner's personal knowledge, and was replete with unsupported hearsay. The district court was "similarly troubled by the inadequacies of [petitioner's] affidavit and [did] not wish to condone such submissions," but it was willing to accept the averments for purposes of ruling on the government's motion because they did not alter the court's conclusion that the State Department was entitled to summary judgment (Pet. App. 27a n.1). The court of appeals likewise found the

3. A unanimous panel of the court of appeals affirmed (Pet. App. 1a-17a). Like the district court, the court of appeals recognized that the agency bears the burden of justifying the withholding, that the agency's supporting affidavit on the classification question is entitled to "substantial weight," and that the adequacy of the affidavit is to be judged under the test the court had previously applied in *Abbotts* and similar cases (*id.* at 7a-8a, 10a, 31a). And like the district court, the court of appeals found that the Eaves affidavit explaining the current classification status of the documents complied with the *Abbotts* requirements, because it "demonstrates a careful, document-by-document and answer-by-answer review" (*id.* at 10a-11a & n.7).

Indeed, the court noted that, as in the district court, petitioner did not actually challenge the adequacy of the Eaves affidavit, standing alone, but rather contended that

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affidavit unpersuasive because it was nothing more than an expression of opinion by an official of another agency regarding the care exercised by diplomatic personnel generally and did not controvert the explanations in the Eaves declaration as to why the document excerpts were properly classified (*id.* at 13a-14a n.8). Petitioner does not challenge the determination by both courts below that his affidavit, even if admissible, was unpersuasive.

Petitioner also speculated in the district court that some of the information at issue might have been disclosed in a 1985 report by a State Department advisory committee discussing overseas embassy security or in congressional hearings on that subject. However, petitioner offered no factual support for this contention. The district court dismissed it as "[u]nsubstantiated guesswork" (Pet. App. 49a-51a), and the court of appeals did not address the point. In this Court, petitioner does refer in passing to his prior suggestion that some of the information might have been made public (see Pet. 6). But because this issue is not mentioned in either the questions presented or the argument portion of the certiorari petition, petitioner apparently has abandoned that basis for opposing summary judgment in the district court as well.

it was " 'controverted by * * * contrary evidence in the record' " (Pet. App. 10a (quoting *Abbotts*, 766 F.2d at 606))—namely, the original classification status of the questionnaire responses. But the court of appeals also rejected that argument (Pet. App. 14a-17a). The court noted that the "unclassified" label was attached to the documents by the ambassadors "without a hint as to their rationales for arriving at such a classification," and that, as the Eaves declaration stated, that designation might have been attached because the questionnaire itself was unclassified (*id.* at 15a). But even assuming that the earlier designations were the product of conscious decisionmaking, the court concluded that "the State Department's burden in this case did not extend to explaining why its reclassification decision departed from the prior *unexplained* decisions of its ambassadors" (*id.* at 16a (emphasis in original)). The court said that in view of the express authority under the Executive Order to reclassify information, the prior classification status of the information does not raise an issue of material fact precluding the entry of summary judgment with respect to the validity of the current classification status (*id.* at 15a-16a). The court explained (*id.* at 16a-17a):

> In order to controvert a reclassification decision, a FOIA petitioner must do more than point to evidence that the information sought was at some previous time classified differently. His contrary evidence must somehow undermine or call into question the correctness of the classification status of the withheld information, or the agency's explanation for the classification. The Eaves affidavit carefully explained why certain portions of the documents were properly classified and [petitioner's] evidence simply does not controvert those explanations.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Both courts below, applying settled legal principles, simply concluded that on the basis of the extensive Eaves affidavit and the remainder of the record in this case, the Department of State was entitled to summary judgment. That fact-bound disposition does not warrant review by this Court.

1. The courts below applied legal principles that have been fashioned by the Court of Appeals for the District of Columbia Circuit in the course of its extensive experience with FOIA Exemption 1 cases. Under the 1974 amendments to Exemption 1, the district court conducts de novo review of the agency's decision to withhold information; the agency bears the burden of justifying the withholding; and the agency's classification decision and supporting affidavit are entitled to "substantial weight." See Pet. App. 7a-8a, 10a, 31a-32a, citing, inter alia, *Afshar* v. *Department of State*, 702 F.2d 1125, 1131 (D.C. Cir. 1983); *Salisbury* v. *United States*, 690 F.2d 966, 970 (D.C. Cir. 1982); *Military Audit Project* v. *Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); *Hayden* v. *NSA*, 608 F.2d 1381, 1387 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980); *Goland* v. *CIA*, 607 F.2d 339, 352 (D.C. Cir. 1979), cert. denied, 445 U.S. 927 (1980); *Ray* v. *Turner*, 587 F.2d 1187 (D.C. Cir. 1978). Petitioner does not disagree with these principles; in fact he expressly endorses the first two (Pet. 13) and simply omits any mention of the courts' correlative duty to give substantial weight to an agency's affidavit, such as the Eaves declaration. In reviewing the adequacy of the Eaves declaration, both courts below extensively discussed and expressly applied the test followed by the District of Columbia Circuit in the very decisions upon

which petitioner relies (Pet. 20-21), including *Abbotts* and *King* v. *United States Department of Justice*, 830 F.2d 210, 217 & nn. 61, 62 (1987). See Pet. App. 10a, 11a-12a, 32a, 35a-36a. This case therefore presents no question concerning the proper legal standards to be applied by a court in a case arising under FOIA Exemption 1.

2. Petitioner contends only that both courts below misapplied these settled legal principles in the particular circumstances of this case. Even then, he does not argue that the exhaustive Eaves declaration was insufficient under *Abbotts* to justify the current classification status of the documents or the entry of summary judgment in favor of the Department of State. And it is plain that, as the declaration explained, the questionnaire responses—to the extent they discussed the security of a United States embassy or other diplomatic posts abroad, an embassy's assessment of our government's relations with the host government, or matters of diplomatic priority and reciprocity with the host government—are properly classified under Section 1.3(a) of the Executive Order: such information clearly concerns "the vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security; * * * foreign government information; * * * [and] foreign relations or foreign activities of the United States." See Pet. App. 11a n.7, 34a-35a.

Petitioner merely renews the argument that, despite the Eaves declaration, the fact that many of the questionnaire responses were designated as unclassified when they were first sent to the State Department creates a genuine issue of material fact regarding the correctness of the current classification status. This contention, which clearly does not warrant further review in any event, was correctly rejected by the courts below: the prior classification of the documents by ambassadors and other officials in foreign

diplomatic posts does not, despite repeated assertions (see Pet. 6, 8, 10-11, 22), create any genuine issue of fact as to the correctness of the Eaves classifications.

It was the responsibility of Eaves to impose consistency on the classification status of the responses. Section 1.6(d) of Exec. Order No. 12,356 expressly authorizes an official presented with an FOIA request for sensitive material to classify information that is not then classified, and Eaves properly invoked that express authority in this case.[5] More basically, it is the responsibility of the Department of State in Washington—not of the various diplomatic posts abroad—to make the final determination regarding what information should and should not be classified. The Secretary of State has the authority to make final classification determinations regarding documents that are subject of FOIA requests, and Eaves, as the Director of the Department of State's Classification and Declassification Center, was the person to whom the Secretary had delegated his authority. It was Eaves—not the ambassadors and other diplomatic personnel at their scattered posts—who had the broad overview, experience, and responsibility necessary to evaluate documents that were responsive to petitioner's FOIA request and to make a consistent and reasoned determination regarding what in-

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[5] Of the original responses submitted to the Department of State in response to the unclassified questionnaire, seven responses were marked "confidential," 35 were marked "Limited Official Use," and the remainder either were not classified or were marked "unclassified" (Pet. App. 5a n.4). Portions of some responses originally marked "Confidential" or "Limited Official Use" were released in part after Eaves' review. Thus, not only did Eaves classify information that previously was not classified; he also declassified information that some ambassadors had originally classified as confidential or designated as for limited use only. See Pet. App. 5a n.4.

formation should be classified in the interests of national security and foreign policy.

The fact that some ambassadors, for unexplained reasons, reached different classification decisions than Eaves reached does not, in any event, suggest any factual dispute whatever. Different classifications may reflect different judgments concerning the dangers of disclosure. Resolution of such differences is the responsibility of the Department of State, not of a court. The mere existence of a disagreement between officials of the same department with different levels of responsibility for a matter obviously cannot be enough to create a triable issue.

Here the Department of State's burden, once it chose to classify and withhold some of the documents sought by petitioner, was to submit a detailed and particularized declaration explaining the bases for the classification. The Department of State met this burden. The fact that classification changes were made does not and should not, without more, create a triable issue of fact, especially where, as here, there was no explanation of the prior classification status by the ambassador or other sending official. As the district court and court of appeals observed, such a rule would penalize the agency for exercising its express authority under the Executive Order to reclassify information and would create a powerful incentive to overclassify information at the outset (Pet. App. 12a, 40a). It would also invite the courts to resolve disagreements that should be resolved within the executive department concerned. Here, the court of appeals correctly ruled that, in order to challenge the classification decision, petitioner was required to submit "more direct or extrinsic evidence" that the current classification status is incorrect (*id.* at 16a). But petitioner submitted no such evidence in this case. For this reason the court of appeals observed (*id.* at 17a (emphasis in original)):

> Thus, we cannot accept [petitioner's] argument that the affixing of conclusory "unclassified" labels on

responses to an unclassified questionnaire *by itself* controverts a detailed review and explanation that some parts of those documents are properly classified.

3. Petitioner contends (Pet. 10) that the effect of the court of appeals' decision is to "abandon any meaningful role in Exemption 1 cases." This contention is wholly without merit. The State Department furnished the extensive Eaves declaration for the very purpose of facilitating the exercise of a meaningful role by the district court, and the opinions below demonstrate that both courts closely examined that declaration and the application of the relevant Executive Order provisions to the information at issue. Petitioner, by contrast, submitted an affidavit of questionable admissiblity that contained only impressions based on unsupported hearsay. See note 4, *supra*. Petitioner did not respond to the Eaves declaration with any evidence that pertained to the specific documents in this case, although the court of appeals made clear that petitioner could have challenged the classification decision if he produced "more direct or extrinsic evidence" that the Eaves classification was improper.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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